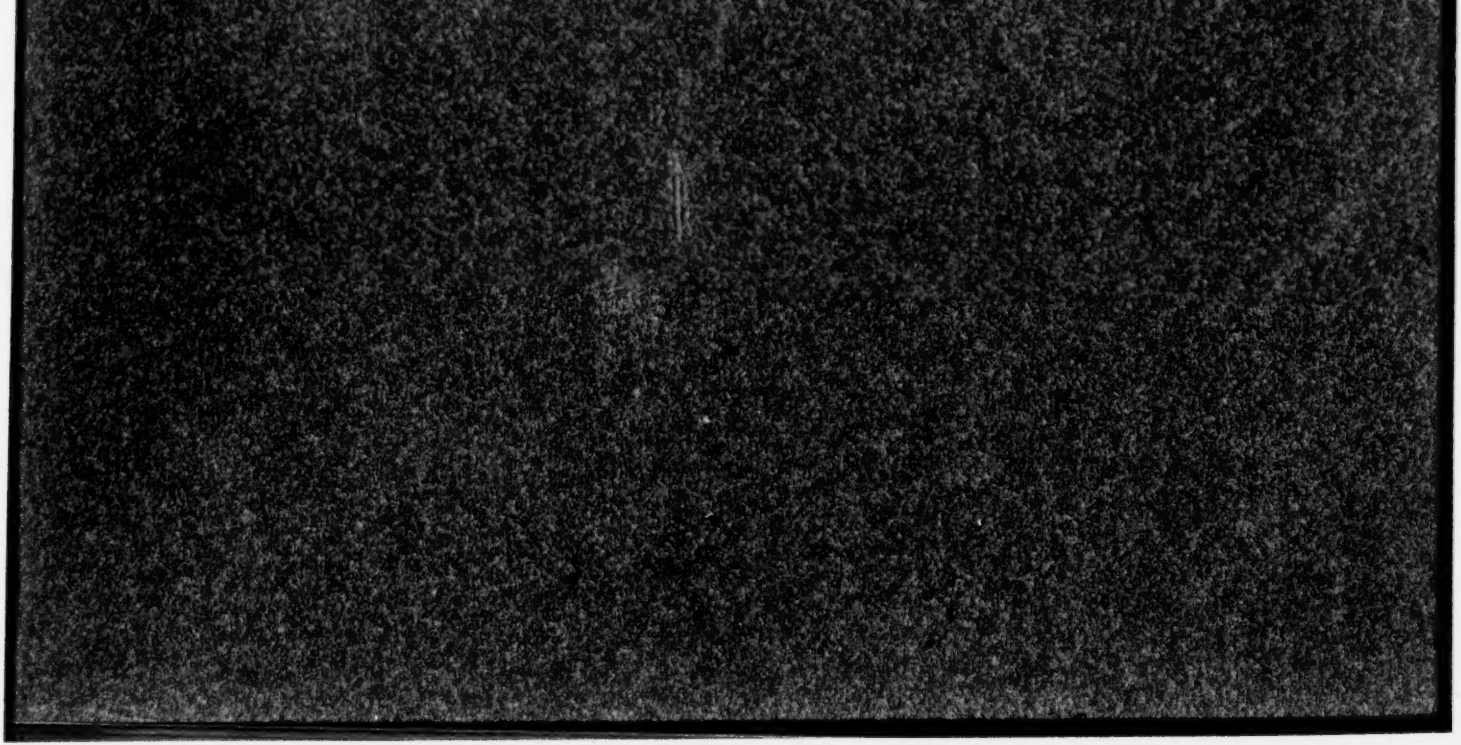
No. 169

In the Supreme Court of the United States

OCTOBER TERM, 1925



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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 169

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

SOLOMON NOVECK

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF THE UNITED STATES

PREVIOUS OPINIONS IN THE PRESENT CASE

The only previous opinion is that of the District Court from which this case comes on direct writ of error. It is unreported, but appears at R. 5–7.

GROUNDS OF JURISDICTION

The judgment to be reviewed is that of the District Court, filed July 3, 1924, appearing at R. 7–8.

By this judgment the District Court granted a motion to quash Count 1 of an indictment (R. 2) charging the defendant with perjury. This count was quashed solely on the ground that more than three years had elapsed between the commission

of the offense and the filing of the indictment. (R. 5–7.) It is the Government's contention that the period of limitation here to be applied is *six* years (under the Act of Nov. 17, 1921, c. 124, 42 Stat. 220), not *three* (under the Act of July 5, 1884, c. 225, 23 Stat. 122), and that the District Court applied the wrong statute of limitations to the case.

This writ of error is prosecuted under the Criminal Appeals Act of 1907. (Act of March 2, 1907, c. 2564, 34 Stat. 1246.)

That act allows the Government a direct writ of error in certain cases, including the following:

(1) from a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

* * * * * * *

(3) from the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

In support of the jurisdiction, the Government cites these cases:

In *United States* v. *Barber*, 219 U. S. 72, this Court held that a judgment dismissing an indictment on the ground of the statute of limitations was a "judgment sustaining a special plea in

bar," and that the name given by counsel to the plea could not alter its nature.

In *United States* v. *Rabinowich*, 238 U. S. 78 (a case very similar to the case at bar), the defense of the statute of limitations was raised by a "motion to quash" and by a "plea in abatement." The Government's contention (as in this case) was that the Court below had applied the wrong statute of limitations. This Court treated the "motion" and the "plea" as amounting to a special plea in bar.

Under the decisions in these two cases, the jurisdiction of this Court in the case at bar is unquestioned.

STATEMENT

Solomon Noveck, the defendant herein, was indicted in the Southern District of New York *on November 5, 1923*, for the crime of perjury, committed in violation of Section 125 of the Penal Code. The indictment (R. 1–4) was in two counts, and dealt with two distinct acts of perjury committed on separate dates. Each count charged the making of a false oath in connection with a Federal income-tax return.

Count 1 set forth in appropriate language the making of a false oath *on March 13, 1920*, before Ida C. Raskin (notary public of New York County), in connection with the 1919 income-tax return of S. Noveck and Co., a corporation of

which the defendant was president and in which he owned 98% of the stock.[1]

The perjury consisted in his statement that the tax due for 1919 was $1,484.84, upon an income which he swore was only $16,251.66, whereas in fact (and to his knowledge) the tax due was approximately $45,664.91, upon an income of $124,127.13.

With Count 2 this case is not concerned. It set forth the taking of a similar oath before the same notary public on March 15, 1921, in connection with the 1920 income-tax return of the same corporation. With respect to this count, no defense based on the statute of limitations could be raised.

On April 15, 1924, Noveck's counsel filed a motion to quash the indictment, based upon various grounds. (R. 5.) One of these grounds was that Count 1 was barred by the statute of limitations. Upon this ground alone, the Court granted the motion to quash Count 1, overruling it as to Count 2. The memorandum opinion on

[1] Section 239 of the Revenue Act of 1918 (Act of Feb. 24, 1919, c. 18, 40 Stat. 1057, 1081) provides:

"That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. *The return shall be sworn to by the president*, vice president, or other principal officer and by the treasurer or assistant treasurer."

Cf. Article 406 of Internal Revenue Regulations 45 (Regulations Relating to Income Tax, etc., under the Revenue Act of 1918); *United States* v. *Benowitz*, 262 Fed. 223; *United States* v. *Morehead*, 243 U. S. 607; *United States* v. *Bailey*, 9 Pet. 238, 253.

this motion appears at R. 5–7. From this decision of the District Court the Government has taken a writ of error direct to this Court, under the Act of March 2, 1907, c. 2564 (34 Stat. 1246) upon the ground that the Court below has wrongly construed the statutes of limitations involved.

SPECIFICATION OF ERRORS TO BE URGED

Count 1, it will be noted, charged perjury committed on *March 13, 1920*. The indictment was filed on *November 5, 1923*. The District Court held that prosecution was barred because the case fell within the *three-year* period of limitation prescribed by S. 1321 of the Revenue Act of 1921 (Act of November 23, 1921, c. 136, 42 Stat. 227, 315) for "offenses arising under the internal-revenue laws." The Government contended below, and contends here, that the case falls within the *six-year* period prescribed by the Act of November 17, 1921, c. 124 (42 Stat. 220) for all offenses "involving the defrauding or attempts to defraud the United States."

This case, therefore, involves two questions, namely:

(1) Is the crime of perjury committed by the making, under oath, of a false income-tax return an offense "*involving the defrauding*" of the Government? The Government contends that it is.

(2) If so, is it also an offense "*arising under the internal-revenue laws?*" The Government contends that it is not.

If both of the Government's contentions are correct, the period of limitations which should have been applied is six years, not three; and this indictment was found in time.

STATUTES INVOLVED

The Act of April 30, 1790, c. 9, s. 32 (1 Stat. 119), originally provided that the period of limitation for all non-capital offenses should be two years. This provision was embodied in Rev. Stats. 1044. By the Act of April 13, 1876, c. 56 (19 Stat. 32), the period was extended to *three* years; and in this form Rev. Stats. 1044 remained until 1921.

By the Act of November 17, 1921, c. 124 (42 Stat. 220), Rev. Stats. 1044 was further amended to read as follows:

> No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however, That in offenses involving the defrauding or attempts to defraud the United States* or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This Act shall ap-

> ply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.

Rev. Stats. 1046, above mentioned, provides a *five-year* period of limitation in the case of—

> any crime *arising under* the revenue laws, or the slave-trade laws of the United States.

This section is not applicable to the case at bar, which requires consideration of the "*internal-revenue*" (not of the "*revenue*") laws. For cases arising under the "*internal-revenue*" laws special provision has been made by other Acts. (v. infra.)

Rev. Stats. 1046 will, however, be hereafter cited in order to show the construction placed by this Court upon the phrase "*arising under.*"

The Act of July 5, 1884, c. 225 (23 Stat. 122), provides:

> That no person shall be prosecuted, tried or punished for any of the various offenses *arising under the internal revenue laws of the United States* unless the indictment is found or the information instituted within three years next after the commission of the offense [in all cases where the penalty prescribed may be imprisonment in the penitentiary, and within two years in all other cases]: *Provided*, That the time during which the person committing the of-

> fense is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings: *Provided further* that the provisions of this act shall not apply to offenses committed prior to its passage: *And provided further* that where a complaint shall be instituted before a Commissioner of the United States within the period above limited, the time shall be extended until the discharge of the Grand Jury at its next session within the district: *And provided further* that this act shall not apply to offenses committed by officers of the United States.

Section 1321 of the Revenue Act of 1921 (Act of November 23, 1921, c. 136, 42 Stat. 227, 315) amended this Act of 1884 by striking out the portion in brackets. This amendment, however, has no bearing on the present case. Perjury being punishable as a felony with five years' imprisonment in the penitentiary, the two-year period of limitation would in any case be inapplicable. Under all the statutes involved, the choice is between *three* years and *six*. No other period of limitation can apply.

ARGUMENT

SUMMARY

I. The crime of perjury committed by the making, under oath, of false income-tax returns is an offense "involving the defrauding" of the Government under the Act of November 17, 1921, c. 124 (42 Stat. 220).

II. It is not an offense "arising under the "internal-revenue laws," within the meaning of the Act of July 5, 1884, c. 225 (23 Stat. 122) as amended.

III. Previous decisions in this Court support the Government's contention. (United States v. Hirsch, 100 U. S. 33; United States v. Rabinowich, 238 U. S. 78.)

I

The crime of perjury committed by the making, under oath, of false income-tax returns is an offense "involving the defrauding" of the Government, under the Act of November 17, 1921, c. 124 (42 Stat. 220).

"Fraud" and "Defrauding" are words of very wide application in the law. *Curley* v. *United States*, 130 Fed. 1; *United States* v. *Owen*, 32 Fed. 534, 537; *Hammerschmidt* v. *United States*, 265 U. S. 182, 188. And the language of the Act above quoted is likewise very wide. By its terms the six-year period of limitation is made applicable to all offenses which—

(1) *involve the defrauding*,

(2) or *attempts to defraud*,

(3) the United States *or any agency thereof*,

(4) whether by conspiracy *or not*,

(5) *and in any manner*,

(6) and now indictable *under any existing statutes*.

It is clear that perjury was indictable "under existing statutes" when the Act of 1921 was passed. It is equally clear that in the case at bar the United States *has been defrauded* of a

tax which was its just due. As was said in *United States* v. *Owen,* 32 Fed. 534, 536:

> To defraud "the United States in any manner or for any purpose" is a very comprehensive expression, and includes every conspiracy to deprive the United States, by the misrepresentation or concealment of material facts, of any kind of property, or whatever may be legally due it on account of taxes, duties, imports, excises, or the like.

Noveck stands indicted for having falsely sworn that the tax due from his corporation (of which he was president and practically sole stockholder) amounted to only $1,484.84. The correct tax is charged as $45,664.91. If these allegations are true (and for the purposes of this case they must be taken as true), Noveck's perjury has directly resulted in a loss to the Government of over forty-four thousand dollars.

Under these circumstances, it can not be denied that his offense is one "*involving the defrauding*" of the Government. The submission of a sworn tax return so palpably false could have no other purpose or result than to "cheat the Government out of property or money." *Hammerschmidt* v. *United States,* 265 U. S. 182, 188. And even assuming that the Government will not be in fact *defrauded* (now that the perjury has been discovered), still there has been an "*attempt to defraud*"; and the Act of 1921 applies also to "*attempts.*"

Fraud of itself is not always an offense against the United States. It is only when coupled with

something else (e. g., conspiracy, under Section 37 of the Penal Code) or when committed in certain ways (e. g., by mis-stating or concealing material facts, under the Act of October 23, 1918, c. 194, 40 Stat. 1015) that fraud becomes a crime under Federal law. If the six-year statute of limitations is to have any application at all, it must extend, as its language indicates, to every case where fraud is "involved." Its operation can not be limited to the single crime of "fraud" (even assuming that such a crime exists), or to any single manifestation of fraud.

The sole question to be considered is this: Is perjury, committed under the circumstances and with the results above set forth, an offense which "*involves the defrauding*" of the Government?

The New Standard Dictionary defines "*involve*" as meaning "to include or necessitate as a part or adjunct; have as a result or logical consequence."

Other dictionaries give similar definitions.

Webster: "To include or contain; esp., to contain implicitly; to have in itself a relative significance to something else; *to connect with* (something) as a natural or logical consequence or effect; to imply."

The New Oxford Dictionary: "To include as a necessary (and therefore unexpressed) feature, circumstance, antecedent condition, *or consequence;* to imply, entail; *to include or affect in its operation.*"

The Century Dictionary: "To include as a necessary or logical consequence."

These definitions have been cited with approval by the Courts. *B. & O. Rly.* v. *Evans*, 169 Ind. 410, 426; *State* v. *Barr*, 5 Ohio N. P. 435, 436.

The case at bar falls clearly within the scope of these definitions. The defrauding of the United States was the necessary and logical consequence of Noveck's perjury: and the six-year period of limitation must apply.

II

The offense here involved is not one "arising under the internal revenue laws" within the meaning of the Act of July 5, 1884, c. 225 (23 Stat. 122), as amended.

It is not enough, however, to establish that Noveck's perjury *involved the defrauding* of the United States. The Government must also establish that his perjury was not an offense "*arising under the internal revenue laws*"; for if it were such an offense, the three-year period of limitation might apply.

The six-year period of limitation applicable to offenses involving fraud originated with the Act of *November 17*, 1921 (*supra*, p. 6). The three-year period applicable to offenses arising under the internal revenue originated with the Act of July 5, 1884 (*supra*, p. 7), and was reenacted on *November 23*, 1921 (*supra*, p. 8). The District Court (R. 6) took the view that the Act of November 23, 1921 was the most recent expres-

sion of the legislative will and that it must control the case at bar.

This view, it is submitted, was incorrect. The Act of November 23, 1921 (so far as this case is concerned), was not a new enactment. It is merely a continuation of the original Act of 1884. But even if it be treated as a new enactment, still it is not in conflict with the Act of November 17, 1921. Congress, in fact, by a later enactment (passed a few days before the District Court's decision) has combined the two in one section, thereby making clear its intent that neither is repealed.[1]

The Revenue Act of 1924, in fact, would indicate that the six-year period must apply to cases

[1] Section 1010 of the Revenue Act of 1924 provides (Act of June 2, 1924, c. 234, 43 Stat. 253, 341):

"(*a*) The Act entitled 'An Act to limit the time within which prosecutions may be instituted against persons charged with violating internal-revenue laws,' approved July 5, 1884, as amended, is amended to read as follows:

"'That no person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal-revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense: *Provided*, That for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, the period of limitation shall be six years, but this proviso shall not apply to acts, offenses, or transactions which were barred by law at the time of the enactment of the Revenue Act of 1924: *Provided further*, That the time during which the person committing the offense is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings: *Provided further*, That the provisions of this Act shall not apply to offenses committed prior to its passage: *Provided further*, That where a complaint shall be instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district: *And provided further*, That this Act shall not apply to offenses committed by officers of the United States.'

which "involve the defrauding" of the United States, even when such cases also "arise under the internal revenue laws." In other words, it would indicate that the Act of November 17, 1921 (*supra*, p. 6) is to be construed as a special statute which, in certain cases, supersedes the general statute of limitations governing all internal-revenue cases. On this theory it might even be conceded that Noveck's perjury "arose" under the internal revenue laws. Yet it would still remain an offense "involving" fraud; and as such it would be taken outside the scope of the three-year limitation imposed by the Act of 1884. The Government, however, does not press this argument, and it does not in any way concede that Noveck's perjury "arose" under the internal-revenue laws.

An offense "*involving the defrauding*" of the United States in a matter of income tax is not necessarily also an offense "*arising under the internal-revenue laws.*" The two phrases are of very different meaning, and have very different applications. When we say that an offense *involves the defrauding* of the Government, we have in mind primarily the purpose for which it was committed, and the consequences which it brings in its train. When we say that an offense *arises under the internal-revenue laws*, we have in mind the statute which creates the offense and gives the Court jurisdiction to punish it. One phrase

points to the results of the crime; the other, to its statutory origin.

Measured by this standard, Noveck's perjury is clearly an offense involving the defrauding of the United States, but *not* an offense arising under the internal-revenue laws. It is true that his false oath was taken in the course of making and filing a tax return, and that this tax return was required by the internal-revenue laws. (*Supra*, p. 4.) It is true that if there had been no income-tax law, there would have been no opportunity or necessity to commit the offense. But this does not mean that the offense *arose* under the income-tax law. The occasion for the offense may have thus arisen, but not the offense itself. A man may, for example, swear falsely on the witness stand in an anti-trust or white slave prosecution; but that fact would not make his perjury *arise* under the Sherman Act or the Mann Act. Regardless of the occasion on which perjury is committed, it remains an offense *arising* solely under Section 125 of the Penal Code.

The offenses which Congress had in mind when it passed the Act of 1884 were offenses which were then, or which might thereafter be, *directly penalized* by some provision of the internal-revenue laws. As examples may be mentioned the various types of extortion arising under Rev. Stats. 3169; frauds by distillers under Rev. Stats. 3257 and 3258; and willful refusal to pay, or evasion of,

taxes under Section 1308 (*b*) of the Revenue Act of 1918. (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1143.) Dozens of other instances could be added. But nowhere in the internal revenue laws can there be found any provision which directly penalizes the crime, here charged, of willful perjury. That crime remains a separate offense arising under a different statute, beyond the intent and beyond the language of the internal revenue laws.

III

Previous decisions in this Court support the Government's contention.

On at least two occasions this Court has been confronted with the phrase *"offense arising under"* a given law. On both occasions its decisions have accorded with the Government's contentions in this case.

Rev. Stats. 1046 (*supra*, p. 7) provides a five-year period of limitation for all offenses *"arising under"* the revenue laws. In *United States* v. *Hirsch*, 100 U. S. 33, the defendant was indicted under Rev. Stats. 5440 (now S. 37 of the Penal Code) for conspiracy to defraud the United States out of certain import duties. The indictment was found more than three years, and less than five, after the offense was committed. Hirsch pleaded the three-year statute of limitations; and this Court sustained the plea, saying that conspiracy was the *gravamen* of the offense. The Court went on to say (p. 35):

The conspiracy here described is a conspiracy to commit any offence against the United States. The fraud mentioned is any fraud against them. It may be against the coin, or consist in cheating the Government of its land or other property. The offence may be treason, and persons have been convicted under this statute for a conspiracy to do the acts which constitute treason against the United States.

Since, then, the section does not mention the revenue or the revenue laws, but in terms includes every form of conspiracy against the United States, and every form of conspiracy to defraud them, *it is difficult to see how the crimes it defines, and which are punishable under it, can be said to arise under the revenue laws.* Specific acts which are violations of the laws made to protect the revenue may be said to be crimes arising under the revenue laws, as are those in the third and fourth counts; but a conspiracy to defraud the Government, though it may be directed to the revenue as its object, is punishable by the general law against all conspiracies, and can hardly be said, in any just sense, to arise under the revenue laws * * *

* * * [p. 36]. Looking, then, to the section in question, which makes no mention of revenue whatever, but enacts in the most general terms a law against conspiracies, we are of opinion that one of the other purposes of the act was to adopt this general penal provision, and that an offence pun-

> ishable under that section alone is not a crime arising under the revenue laws, though the overt act necessary to be alleged may be one affecting the revenue of the United States. [Italics ours.]

In *United States* v. *Rabinowich*, 238 U. S. 78, the defendant was indicted for conspiring to conceal from a trustee in bankruptcy certain property belonging to the bankrupt estate. The substantive offense to which the conspiracy was directed was punishable under Section 29b of the Bankruptcy Act. (Act of July 1, 1898, c. 541; 30 Stat. 544, 554.) Under Section 29d of the Bankruptcy Act, the period of limitation "for any offense *arising under this Act*" was one year. By a motion and a plea (which this Court treated as a special plea in bar), Rabinowich raised the point that the indictment was found more than one year after the commission of the offense. On demurrer, his plea was sustained; and the United States (as in the present case) sued out a writ of error under the Criminal Appeals Act of 1907, on the ground that the Court below had applied the wrong statute of limitation.

This Court, reaffirming the doctrine of *United States* v. *Hirsch, supra,* held that the one-year period of limitation did not apply. The Court said (pp. 87, 88):

> Defendant in error, while conceding, for the purposes of the argument, that the con-

spiracy and the substantive offense are separate and distinct, insists that the question still remains whether such a conspiracy offense as is here charged "arises under" the Bankruptcy Act, within the meaning of the special statute of limitations contained therein. The argument is that this bar is not by its terms limited to offenses enumerated or fully defined in the Act, but extends to all offenses "arising under" it; that without a law creating the substantive offense of "concealing," etc., a conspiracy to do the acts contemplated by the present defendants would not be a crime, and hence, that it is this law, rather than the conspiracy statute, which "gives rise" to the conspiracy offense.

This argument is ingeniously elaborated, but it has not convinced us. *We deem it more reasonable to interpret "any offense arising under this Act" as limited to offenses created and defined by the same enactment.* In reaching this conclusion, we have not merely had regard to the proximity of the clause to the context, but have attributed to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different; a distinction whose practical importance in the criminal law is not easily overestimated. [Italics ours.]

The reasoning in both of these cases applies with full force to the case at bar. If conspiracy

is an offense *sui generis*, so is perjury. Neither the substantive crime which forms the purpose of the conspiracy nor the proceedings which furnish the occasion for the perjury can destroy the identity or alter the nature of the offense actually committed. Conspiracy remains conspiracy, whatever its purpose. Perjury remains perjury, whatever its occasion. The one is created and defined by the general law against all conspiracies; the other, by the general law against all perjuries. The one "*arises under*" Section 37 of the Penal Code; the other, under Section 125. And if that is so, then the three-year limitation for offenses "arising under" the internal revenue laws can have no application to the case at bar.

CONCLUSION

It is therefore respectfully submitted that the District Court was in error when it granted the motion to quash Count One of this indictment. The judgment of the District Court on this point should be reversed, and the cause remanded for trial.

WILLIAM D. MITCHELL,
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AUGUST, 1925.

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Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF SOLOMON NOVECK.

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BRIEF ON BEHALF OF SOLOMON NOVECK.

This writ of error is prosecuted by the United States under the Criminal Appeals Act of March 2, 1907, 34 Stat., 1246. The District Court of the United States for the Southern District of New York dismissed the first count of the indictment containing two counts, each charging perjury. The District Court held that the first count was barred by the Statute of Limitations.

Statement.

The first count (the count dismissed by the District Court now under review here) charges perjury on March 13, 1920, in that the defendant did take an oath before a notary public that an income tax return for the year

1919 of S. Noveck & Co., Inc., was true, whereas it was false with respect to (1) the amount of income tax due from S. Noveck & Co., Inc., and (2) the total net income of the said corporation for the year 1919.

The second count of the indictment relates to the return of the same corporation for 1920. In addition to a difference in dates and amounts, the first count contains one important and novel variation from the usual form of perjury indictment. The first count charges that

> "the defendant herein, did unlawfully, willfully, corruptly and knowingly *and fraudulently* commit the crime of perjury, as defined by section 125 of the United States Criminal Code in that at the time and place aforesaid the defendant Solomon Noveck did (*for the purpose of defrauding the United States*) take an oath," etc. (Parentheses in original; italics ours.)

The second count of the indictment omits the words "fraudulently" and "for the purpose of defrauding the United States," italicised in the above quotation. These words were obviously added to the first count because the pleader knew that the indictment was filed after the three-year period of limitations had run, and he sought by the addition of these words to bring the indictment within the six-year statute.

The indictment was not filed until November 5, 1923. If a three-year period applies, the offence alleged in the first count was barred on and after March 13, 1923. If the six-year period applies, the indictment was filed in time.

ARGUMENT.

I.

The crime of perjury is not an offense "involving the defrauding" of the Government under R. S., 1044 as amended by the act of November 17, 1921 (42 Stat., 220).

The brief of the Solicitor General proceeds on the theory that, if an offense *may* result in fraud, it is barred only by the six-year statute. Perjury, as denounced in Section 125 of the Criminal Code, in no sense involves the defrauding or attempting to defraud the United States or any agency thereof. Section 125 reads as follows:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years."

In order to establish the crime of perjury, only the following elements need be proved:

> (1) That the defendant took an oath to testify or depose truly, or that any declaration, deposition or certificate by him subscribed was true
> (2) before a competent tribunal, officer or person
> (3) in a case in which a law of the United States authorizes an oath to be administered

(4) and that he did willfully state or subscribe a material matter

(5) which he did not believe to be true.

No element of fraud or attempt to defraud is included. The addition by the pleader of the words "fraudulently" and "for the purpose of defrauding the United States" cannot add to the essentials of the offense charged. Section 125 is complete, and is but a statement of the common law definition of perjury, confined to cases where a law of the United States authorizes the oath.

R. S. 1044, as amended, provides:

> "No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however, That in offenses involving the defrauding or attempts to defraud the United States* or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws." (Act of Nov. 17, 1921, 42 Stat., 220.)

Both the court below, in its opinion, and the Solicitor General have overlooked the fact that three separate statutes of limitation should be considered in determining this matter. The question is not whether the six-year statute covering cases involving fraud on the Government or, in the alternative, the three-year statute governing internal revenue cases, should apply, but rather whether either of those statutes applies, or, as a third possibility, whether the general limitation of three years still con-

tained in R. S. 1044, as amended, should control. In other words, if perjury does *not* involve a fraud on the Government and does not arise under the Internal Revenue laws, it would be governed by the statute of limitations applying to crimes generally, such as violations of the Mann Act or of the Sherman Law, offenses on the high seas, or any offense against the United States which cannot by any possibility involve or result in a fraud on the Government.

The definitions of the word "involve" from standard dictionaries quoted on pages 11 and 12 of the Government's brief confirm the view that the offense itself, in order to be brought within the six-year period, must include, as a necessary element, an attempt to defraud or an actual defrauding of the United States. Perjury as an offense does not "include or necessitate as a part or adjunct," or "have as a result or logical consequence" either of these elements (paraphrasing definition in New Standard Dictionary). Nor does it include or contain implicitly, or have in itself a relative significance to these elements; nor, as a natural or logical consequence or effect, is it connected with, nor does it imply, the element of defrauding the Government (paraphrasing Webster's definition). Nor is the fraud element included as a necessary (and, therefore, unexpressed) feature, circumstance, antecedent, condition, or consequence (New Oxford Dictionary). Nor is it included as a necessary or logical consequence (Century Dictionary).

The *crime* of perjury does not include any element of fraud upon the United States. Therefore, the offense here charged is not one involving the defrauding or an attempt to defraud the United States.

Even construing the alleged perjury of Noveck as resulting either in the defrauding or an attempt to defraud the United States, neither of these elements is part of the offense itself. Under section 125 they are unnecessary allegations, and, therefore, surplusage. Surplusage need

not be proved. *In re Lane*, 136 U. S., 443, 448; *U. S.* v. *Patterson*, 59 Fed., 280, 281. Certainly the trial court would not have to charge the jury to acquit unless it found fraud or a purpose to defraud the United States.

Should the Government's contention be adopted, the anomalous situation would be presented of having a three-year limitation apply to some crimes of perjury and a six-year period to others. In each instance it would be necessary for the court to analyze the result of the offense and determine whether the Government might be said to have been defrauded. Obviously, this was never the intent of Congress. Many instances of perjury could be given which by no possibility could involve the defrauding or attempt to defraud the Government. Perjury in an action between two private litigants in a Federal Court is such a case.

In *United States* v. *Rabinowich*, 238 U. S., 78, 88, wherein this court interpreted the phrase "any offense arising under this Act," found in the limitation prescribed in the Bankruptcy Act, the court said:

> "* * * In reaching this conclusion, we have not merely had regard to the proximity of the clause to the context, but have attributed to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different; a distinction whose practical importance in the criminal law is not easily overestimated."

CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be affirmed.

New York, January 11, 1926.

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